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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHELPS CEMENT PRODUCTS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

May employees be deprived of their statutory right to an election under Section 7 of the National Labor Relations Act, as amended. In the absence of an election, may the National Labor Relations Board order an employer to bargain with a union without clear and convincing evidence that the employer voluntarily recognized the union and thereby waived its right to insist upon an election under Section 9 of the National Labor Relations Act as required by the Court's holding in *Linden Lumber*.

May the Board order an employer to recognize and bargain with a union absent proof of majority status and outrageous and pervasive unfair labor practices.

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PHELPS CEMENT PRODUCTS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Phelps Cement Products, Inc., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit, enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears in Appendix A. The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 257 N.L.R.B. No. 4 (1981) and appear in Appendix B. The decision and order of the administrative law judge are reproduced in Appendix C.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on April 1, 1982. Petitioner's petition for rehearing and rehearing en banc was denied on May 19, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and §10(f) of the National Labor Relations Act, as amended.

APPLICABLE STATUTORY PROVISIONS

The pertinent provisions of the National Labor Relations Act, as amended (herein, the "Act"), are Sections 1, 7, 8(a)(5) and 9. They are set forth in Appendix "D".

STATEMENT OF THE CASE

Petitioner, Phelps Cement Products, Inc. (herein, the "Company"), is a New York corporation engaged in the manufacture of cement, concrete blocks, and the retail sale of hardware and masonry supplies. The Company consists of one facility, a plant located in Phelps, New York. At the time of the dispute, the plant had approximately twenty-five total employees.

The Company is a closely-held corporation. Philip Haers, Jr., its president and member of the board of directors, is responsible for the Company's daily operations. Philip Haers, Jr., has served in that capacity since 1976, when his father, Philemon Haers, Sr., retired from day-to-day control. Although retaining the title of chairman of the board, Philemon Haers, Sr., continues to serve solely in an advisory capacity. (C.3)

This dispute has as its genesis a meeting which took place on November 28, 1979 at the Company's business office adjacent to the Company's plant. The meeting was initially attended by Philemon Haers, Sr., and James Walters, Business Representative for Bricklayers, Masons, and Plasterers Local No. 43 of the Finger Lakes Region (herein, the "Union"). Messrs. Haers and Wal-

ters were later joined by Philip Haers, Jr. The seminal factual dispute is whether, during the course of the meeting, the Company, through the Haers, agreed to waive its and its employees' statutory rights to an election conducted by the Board.

Walters arrived at the Company, unannounced and alone, at approximately two o'clock p.m. Walters had in his possession union authorization cards purportedly signed by ten of the Company's employees. (C.3)

Walters asked to see Phil Haers and was led into the office of Philemon Haers, Sr. After some introductory remarks, Walters produced the authorization cards for examination. (C.4)

Within the hour, Philip Haers, Jr., appeared and inquired as to the nature of Walters' business. Walters informed him that he was a representative of the Union and that he was requesting that the Company commence negotiations.

During the next hour, the employment status of employees on Walters' cards was discussed with the Company's payroll clerk. The parties were unable to agree as to the names and job titles of the employees who would comprise an appropriate unit. The Company believed the unit should have included twenty employees while the Union argued that only fifteen or sixteen would have been eligible to vote.

It is significant to note that although Walters purportedly had ten cards, the testimony revealed that one card was submitted by an employee who was no longer employed by the Company while a second card was signed by an individual never employed by the Company. (C.5)

The Haers inquired as to the possible alternatives to voluntary recognition and Walters explained that if the Company declined to recognize the union voluntarily, he would pursue filing a petition with the Board, eventually leading to an election. Additionally, Philip Haers, Jr., asked Walters to describe the scenario if negotiations

took place and Walters described a procedure of circulating proposals for a contract among employees, and then, conducting discussions with management. Finally, the parties discussed employee benefits currently offered by the Company. (C.5) At the trial, Walters testified that the Haers stated a desire for an election but thereafter vacilated between wanting an election and expressing a willingness "to get it over with".

Toward the conclusion of the conversation, Philip Haers, Jr., advised Walters that neither he nor his father could make the decision. Rather, a meeting of the Company's board of directors would be required to determine whether or not a Board-conducted election was preferable to voluntary recognition. The meeting concluded at approximately 4:40 p.m. (C.6)

Immediately following the meeting with Walters, a special meeting of the Company's board of directors was convened. Phil Haers, Jr., informed the group that he had been advised by Walters that a majority of employees had requested the Union to represent them as their collective bargaining agent. Phil Haers, Jr., also informed the board of directors of the alternative available for a Board-sponsored election at which time all eligible employees would cast a vote and thereby make their own decision.

After deliberation, the meeting ended with Phil Haers, Jr., being instructed to call Walters the following day and tell him that the Company wanted an election. (C.6)

On the following morning, Phil Haers, Jr., telephoned Walters and informed him that the Company desired an election. (C.6) The Union declined to file a petition for an election. Instead, on December 4, 1979, the Union filed a charge with the Board alleging, *inter alia*, that the Company agreed to recognize the Union and thereafter, unlawfully withdrew its recognition. The Union sought, thereby, to eliminate an employee vote

and, instead, requested a bargaining order be imposed. On January 11, 1980, the Board issued a complaint alleging, *inter alia*, that the Employer unlawfully withdrew recognition of the Union in violation of Sections 8(a) (1) and (5) of the Act.

The Board's Conclusions of Law and Order

A hearing was held before Richard L. Dennison, Adminstrative Law Judge (herein, the "ALJ"), on June 18, 19, and 20, 1980, in Rochester, New York. The ALJ issued his decision on April 9, 1981, in favor of the Union. Thereafter, exceptions were filed by the Company. On July 21, 1981, the Board issued its decision and order affirming, in its entirety, the decision of the ALJ. (B.1,2)

The ALJ found that recognition had been accorded by the Company at the November 28 meeting. The ALJ concluded that the Haers and Walters agreed to voluntarily recognize the Union based on Walters' testimony that the Haers agreed to recognize the Union and thereafter wanted an election and then changed and changed back again. After testifying that the Haers never really committed themselves, Walters, in summary fashion, stated, "I don't remember the exact words, but an agreement was reached to bargain." The ALJ discredited the Haers' testimony as not comprehensive. The ALJ, without support from, or a reference to the transcript, stated in conclusory fashion that the Haers omitted detailed references to portions of the conference. Moreover, the ALJ, without substantial explanation, or reference to any corroborative evidence, accepted Walters' vague conclusion and found that the Company had voluntarily recognized the Union. (C.6)

Not only did the ALJ make this finding of recognition notwithstanding the vagueness of Walters' recollection and a lack of corroborating testimony, but, when Walters testified that he telephoned his attorney immediately after his meeting with the Haers, the ALJ denied

counsel for the Company's request to examine Walters on the only potentially independent corrobative evidence under the aegis of the attorney-client privilige. The ALJ also made clear his refusal to allow the Union's attorney to be subjected to examination.

Why did the ALJ refuse to allow the Company's attorney the opportunity of examining the witness about the Union's only alleged corrobative post-meeting conduct? Indeed, the transcript of the trial was replete with the ALJ's refusal to allow the Company's attorney the opportunity of exploring into the commission or omission of other patterns and practices by the Union under similar circumstances. In a case to be decided on the basis of conflicting oral testimony, why did the ALJ so severely limit the scope of cross examination?[1]

The ALJ also found that the special meeting of the Company's board of directors occurred, that Phil Haers, Jr., had left that meeting with instructions to request an election, and that Phil Haers, Jr., in fact called the next day to report the Company's decision to Walters. (C.7) These findings, which appear to support the Company's position, were neither discredited, dismissed, or reconciled with the ALJ's conclusion that voluntary recognition occurred and therefore, there would have been no reason for the meeting to have taken place.

Further, despite objections by the Company and no testimony or other evidence in support thereof, the ALJ determined the unit composition of sixteen employees to be appropriate. (C.6) The ALJ's determination effectively ordered the Company to recognize and bargain with the Union without proof of majority status.

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1. For example, the ALJ refused to permit testimony establishing Walters' past pattern and practices when seeking recognition. Furthermore, the ALJ refused any testimony as to why Walters failed to advise employees that recognition had been voluntarily granted and that the employees did not have any knowledge of recognition until much later.

Finally, the ALJ ordered the Company to restore recognition and bargain with the Union upon request. (C.8,9)

The Decision of the Court of Appeals

The Second Circuit Court of Appeals, acting on the Company's petition for review and the Board's cross-petition for enforcement, affirmed the ALJ's order by a 3-0 vote.

In its summary opinion, the court would not disturb the credibility findings of the ALJ. With respect to the lack of corroborative evidence of voluntary recognition and Walters' vague recollection, the Court stated that, "It is not unusual for a person to forget the specific words spoken to him six months earlier." (A.2)

With respect to the Board's refusal to distinguish the case from those involving a repudiation of recognition, the court held that this was a policy matter for the Board and not the court, citing the opinion of the First Circuit Court of Appeals in *N.L.R.B. v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979). (A.3)

The Court declined to address the issue of majority status, the appropriate unit, the ALJ's refusal to allow reasonable cross examination, the lack of corroborative evidence, and this Court's opinion favoring elections to protect employees' Section 7 rights when questions concerning representation are raised.

REASONS FOR GRANTING THE WRIT

The National Labor Relations Board must not deprive employees of their statutory right to select the bargaining representative of their choice, absent clear and convincing evidence that an employer voluntarily recognized a union thereby waiving its right to insist upon an election under Section 9 of the National Labor Relations Act as required by the Court's holding in *Linden Lumber*.

In this case, the Company respectfully requests the Court to clarify the burden of proof required to establish a voluntary grant of recognition to collective bargaining agents. Articulation of a standard of proof will correct inequities in the Board's current policy and promote protection of employee rights under Section 7. Moreover, it is respectfully submitted that there is a foundation for such articulation in prior cases of the Court as well as the Board.

Under current policy, the Board's position is that, absent other violations of the Act, an employer has a right to require an election regardless of a union's demonstration of majority status. *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301 (1974). On the other hand, once an employer expressly recognizes a union, no matter how informally, the Board's position is that the right to an election is lost. *N.L.R.B. v. Brown & Connolly, Inc., supra; N.L.R.B. v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *N.L.R.B. v. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976). The Company believes that in the case of informal recognition, the Board's policy implies a mere preponderance of the evidence, a standard of proof that is contrary to, or in conflict with other Board cases and which has caused an inequitable, and, in this case, wrong result.

This case is appropriate for examination of this issue since it involves a unique factual situation, never before addressed by the Board or the courts. Here, the Board has ordered bargaining after the Union claimed recognition was granted without any corroborating evidence or testimony. More specifically, there is no bargaining history subsequent to the circumstances where the Company allegedly granted voluntary recognition to the Union. This element is conspicuously present in those holdings relied upon by the Board and the circuit court to conclude that recognition has been granted. It should be noted, also, that there are no other unfair labor practice charges against the Company.

The Board relied upon two cases to support its decision that the Company should be ordered to bargain with the Union. Those cases, *Lyon & Ryan Ford, Inc.*, 246 N.L.R.B. 1 (1978), *enf'd*, 647 F.2d 745 (7th Cir. 1981), and *Jerr-Dan Corp.*, 237 N.L.R.B. 302 (1979), are factually dissimilar to the case presently before this Court.

Lyon & Ryan Ford, Inc. involved an employer who had admittedly recognized a union as the collective bargaining agent for his employees and thereafter engaged in a course of egregious unfair labor practices culminating in the withdrawal of recognition. The parties engaged in extensive bargaining prior to the employer's withdrawal of recognition, having met at least three times to discuss various contract proposals before the employer announced that he wished to have an election. Those facts are not present in this case.

Similarly, *Jerr-Dan Corp.* involved an employer who withdrew recognition after he had acknowledged that the union had in its possession authorization cards from a majority of employees and then agreed to meet four days later. 237 N.L.R.B., at 303 (Citing *Brown & Connolly, Inc.*, 237 N.L.R.B. 271 (1978)).

In *Jerr-Dan Corp.* and *Brown & Connolly*, the Board concluded that the employer had *expressly* stated that it recognized the union.[2] Therefore, the Board had no reason to articulate a standard of proof required to make a conclusion of voluntary recognition. Here, however, no finding was ever made by the ALJ or the Board that the Company expressly recognized the Union.

Jerr-Dan Corp. and *Brown & Connolly* are best characterized as "reneging cases" where evidence of bargaining, or a commitment thereto, was found subsequent to express recognition. Thus, the Board had a firm

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2. Moreover, the facts in *Jerr-Dan Corp.* clearly showed that the employer waived his right to an election which he has a right to when confronted with a bargaining demand if he has committed no other unfair labor practices pursuant to *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301 (1974). *Jerr-Dan*, 237 N.L.R.B. at 303, n.7.

basis for concluding that recognition was granted even in the mind of the employers.

This case, on the other hand, concerns the question of whether or not voluntary recognition was ever afforded the Union. It does not involve a case where an employer withdrew recognition. The Board's policy fails in its application to this case by not permitting the ALJ or the circuit court to analyze the dominant issue of the case.

While *Jerr-Dan* was appealed to, and enforced by the Third Circuit in an unpublished decision, 601 F.2d 575 (1979), the First Circuit, in the *Brown & Connolly* enforcement proceeding, 593 F.2d 1373 (1st Cir. 1979), analyzed the inequitable predicament of the employer and suggested that the Board's policy be revised along the same lines proposed by the Company here.

In *Brown & Connolly*, eleven of the employer's seventeen employees, along with two union organizers, called upon the employer's president unannounced and recited a scripted dialogue forcing an admission from the president that he "recognized" the union. Based on substantial and credited testimony, the Board found its magic words of express recognition. On appeal, the circuit court commented that, ". . . even on General Counsel's case, the whole meeting might remind chess players of the fool's mate." 593 F.2d, at 1374. The court concluded that:

> The facts in this case might suggest the desirability of a rule that *recognition must be clearly and convincingly evidenced and not dependent upon* a staged performance and *resolution of disputed, possibly pergered testimony* which may have fostered here, at least in part, the very strife the Act is intended to prevent. [Emphasis supplied.] *id.*

Unlike this case, however, the employer in *Brown & Connolly* went on to commit several other unfair labor

practices subsequent to its refusal to bargain. Thus, the First Circuit would not disturb the Board's policy. *id.*

Interpreting the Company's actions as a repudiation, the Board, in this case, has been forced to utilize the vague recollection of Busines Agent Walters as the only evidence of recognition voluntarily accorded. Clearly, this case represents the obvious inequity in the Board's lack of articulation of an appropriate evidentiary standard.

The circuit court's upholding of the Board's conclusion was without support ("It is not unusual for a person to forget what was said six months earlier."), and, improper under the Board's policy since there was no finding of express recognition by the Employer.

The Company does not propose that the Court remove the opportunity for employers to voluntarily recognize a union upon demonstration of majority status which may be adjunct to the Act's policy promoting labor relations stability. *N.L.R.B. v. Broadmoor Lumber*, 578 F.2d 238 (9th Cir. 1978). The Company, also, does not suggest that the Court inhibit the ability to ascertain majority status by informal mechanisms such as a binding card count or poll. Instead, the Company proposes that the Court correct the inequity of the Board's policy by requiring clear and convincing evidence in the case of a voluntary grant of recognition which carries an implicit waiver of employee rights to an election under Section 7 of the Act. This standard of proof will promote protection of employee rights, one of the central policies of the Act.

The circuit court refused to disturb the evidentiary finding of the ALJ, quoting from its earlier decision in *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 490 (1952), that "it may not upset the Board when [it] accepts a finding of an Examiner which is grounded upon . . . the Examiner's evaluation or oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documen-

tary testimony." With this requirement, the Company assumes a heavy and, perhaps, wrongfully-placed burden of proof that a waiver of its and its employees' statutory rights has occurred.

The primacy of the fundamental purposes of the Act is trumpeted by Section 1 which declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection."

Since a statutory right to an election is involved, the Board must be required to find clear and convincing evidence of a waiver of that right, and not the Company. With this burden of proof, the policy protecting employee rights under the Act is preserved.

Indeed, the Board itself has recognized that statutory rights, in particular Section 7 rights, are to be treated specially. Chairman Fanning, concurring in *Goya Foods, Inc.*, 238 N.L.R.B. 1465, 1467, (1978), stated succinctly that:

> Where Section 7 or statutory rights have been involved, the Board has insisted that waivers will not be readily inferred, and that there must be a clear and unmistakable showing that the waiver occurred.

The Employer asks, can Mr. Walters' testimony be read as a clear and unmistakable showing that a waiver of a Board election had occurred? Mr. Walters' testimony cannot provide the basis for a finding that a clear and unmistakable showing of an agreement to voluntarily recognize and bargain with the Union was in fact reached.

If the evidence presented in this case is held to be a sufficient basis for finding a clear and unmistakable waiver of a Board election, it will require little imagination for union representatives to conjure up facts sufficient to create bargaining obligations on the part of unsuspecting employers.

The practical effect of such a decision would do more than place the burden, rejected by the Supreme Court as discussed below, upon the employer to petition for an election. An employer, to avoid any possibility of misunderstanding or fabrication, would have no alternative but to refuse to meet with any union official who attempts to present evidence of majority status or who otherwise desires to discuss any issue concerning representation. Clearly, such a scenario violates the Board's own policy favoring voluntary cooperation with a union not only for representation, but for collective bargaining purposes as well.

Moreover, it is respectfully submitted that adoption of a clear and convincing standard has foundation in prior decisions of this Court.

In *Linden Lumber Division*, 190 N.L.R.B. 718 (1971), the Board recognized the inherent unreliability of authorization cards as a means for determining a collective bargaining representative. In that case, the Board retreated from its previous doctrine enunciated in *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732 (D.C. Cir. 1950), which had required a good-faith doubt to exist before an employer could refuse to recognize a union on the basis of authorization cards alone. In *Linden Lumber Division*, the Board found that employers "should not be guilty of a violation of Section 8(a)(5) solely upon the basis of [their] refusal to accept evidence of a majority status other than the results of a Board election." *Linden Lumber Division, supra*, at 721. The Board held that no longer would representation rights be determined by good or bad faith doubts.

The Supreme Court reversed the decision of the Court of Appeals for the District of Columbia, which had held that an employer who refused to recognize a union claiming a card majority had the burden of petitioning the Board for an election. Instead, the Supreme Court adopted the Board's position that the burden of clarifying questions concerning employees' selection of a bargain-

ing agent was properly placed on the union. The Court restated its position first articulated in *Gissel Packing Co. v. N.L.R.B.*, 395 U.S. 575 (1969), that, "[T]he election process has acknowledged superiority in ascertaining whether a union has majority support . . ." *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301, at 304 (1974). Thus, a preference for objective considerations to govern choice of bargaining agents has been acknowledged.

The case at bar presents a paradigm of why the electoral process is favored. An unfair labor practice proceeding, leading to a bargaining order was prosecuted based upon, at best, a scintilla of evidence consisting of a bare statement by a union business agent that the Company had agreed to recognize the union.[3] The Company contended that no such agreement was entered into. As a result, nearly three years have elapsed without a determination as to whether or not the Union actually represented a majority of the employees. Had the Union petitioned for an election after Walters' meeting with the Haers, the matter would have been resolved without reliance on authorization cards which had become stale and most likely inaccurate.

The Supreme Court anticipated precisely this situation in *Linden*. Justice Douglas, in the majority opinion, stated:

> The union which is faced with an unwilling employer has two alternative remedies under the

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3. Although the Company's objection to the ALJ's refusal to permit testimony of the telephone call to the Union's attorney was dealt with, under the aegis of the attorney-client privilege, the court in *N.L.R.B. v. Gogin*, 575 F.2d, at 605, accepted the Board's resolution of a telephone conversation in this regard. Thus, the ALJ's denial of the Company's request may have been proper. However, a disputed telephone call seems inappropriate to resolve the important question of recognition. Therefore, the Company does not, and has not, requested a remand to adduce additional evidence and believes that articulation of a standard of proof subsumes this issue.

> Board's decision in the instant cases. It can file for an election; or it can press unfair labor practices against the employer under *Gissel*. The latter alternative promises to consume much time. In *Linden* the time between filing the charge and the Board's ruling was about four and one-half years; in *Wilder*, about six and one-half years. The Board's experience indicates that the median time in a contested case is 388 days. On the other hand, the median time between the filing of the petition for an election and the decision of the Regional Director is about 45 days. In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored. *Linden, supra*, at 306-307. (Other citations omitted.)

The unambiguous teaching of *Linden* is that in situations similar to this case, our national labor policies favor filing a petition for an election over a subjective determination of recognition. A petition will resolve, by prompt and peaceful means, the question of whether the union enjoys majority status and, thus, secure an honest mandate for recognition.

The policy invoked by the Board in this case has substantially interfered with the ability of employees to exercise their free choice. The Court, in *Linden Lumber*, expressed its view that the use of unfair labor practice proceedings tend to inhibit, rather than enhance the growth of industrial peace. It was the goal of industrial peace that compelled the Board to retreat from its *Joy Silk Mills* doctrine when adopting the view advanced in *Linden Lumber*. The Board's decision in this matter, if permitted to stand, would mark a return to a highly pernicious version of the *Joy Silk Mills* doctrine.

Unreversed, this decision would allow vague and uncorroborated testimony to create the sole basis of a bargaining obligation. The Board's policy, if upheld, will

effectively set a precedent which will result in the re-establishment of Section 8(a) (5) proceedings as the preferred means for achieving recognition. Such a precedent would seriously undermine the electoral process and destroy statutory rights accorded under the Act. On the other hand, adoption of a clear and convincing standard of proof will preserve employees' Section 7 rights and promote the objective determination of employees' choice of bargaining agent as achieved by election procedures, without removing, in appropriate situations, the furtherance of industrial peace through informal and voluntary recognition.

The second question presented is whether the Board may issue a bargaining order without proof of majority status. This issue arises because there was a factual dispute as to the names and job classifications of persons that enjoy the community of interest necessary to be considered part of an appropriate unit of the Company's employees.

It was the Company's contention that on November 28, 1979, twenty of the Company's employees shared a community of interest which required the inclusion of all of them in an appropriate unit, whereas the Union believed that only fifteen or sixteen employees should be unit members. The actual number of employees that constituted an appropriate unit is important because, if the Union did not at the time of demanding recognition possess valid and authentic authorization cards signed by a majority of the employees that comprise an appropriate unit, the Company as a matter of law could not agree to voluntarily recognize the Union as the representative for collective bargaining purposes of its employees. *International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737-738 (1961).

The ALJ concluded the appropriate composition of the Union without any analysis of the arguments presented by the Company or the Union. In fact, the ALJ concluded in a footnote that the parties agreed to the ap-

propriate composition of the unit without reference to any position of the transcript. (C.6) Moreover, there was no testimony in the transcript demonstrating that the parties agreed as to unit composition. How can the Company be ordered to bargain with the Union when it is unclear whether the Union has acquired authorization from at least a majority of the employees? Assuming, *arguendo*, that the Company did not voluntarily agree to recognize the Union, recognition under these circumstances would have been clearly unlawful. Therefore, the Board's bargaining order has no basis with respect to recognition nor with respect to the majority status of the Union.

The Company respectfully submits that the Board may not issue a bargaining order in an informal recognition case when a question concerning unit composition is concluded by the ALJ on vague testimony. The Company respectfully requests that the Court issue a writ of certiorari based on this question as well.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari shoud be granted.

Respectfully submitted,

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August 12, 1982

Appendix A
Order of the Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81-4150

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of April, one thousand nine hundred and eighty-two.

Present:
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
HON. RICHARD J. CARDAMONE,
Circuit Judges.

PHELPS CEMENT PRODUCTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

BRICKLAYERS, MASONS, AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION,
Intervenor.

ORDER

This is a petition by Phelps Cement Products, Inc. seeking review of an order by the National Labor Relations Board and a cross-application by the Board for enforcement of that order. The order, issued on July 21, 1981, is reported at 257 N.L.R.B. No. 4. The Board found that the company violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C.

§§158(a)(5), (1), by refusing to bargain with Bricklayers, Masons, and Plasterers' Local No. 43 of the Fingerlakes Region, which the company had voluntarily recognized as the exclusive representative of an appropriate unit of the company's employees. We deny the company's petition for review and enforce the Board's order in full.

The company's first contention is that there is not substantial evidence on the record as a whole to support the Board's finding that the company voluntarily recognized the union as the bargaining representative for its sixteen production and maintenance employees and agreed to bargain with it. "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

In this case the determination of whether the company agreed to recognize the union turned on whose testimony was to be credited. Walters, the union's business agent, testified that in a lengthy meeting on November 28, 1979, Haers, Sr. and Haers, Jr. — the company's chairman of the board and its president — agreed to recognize the union based on the authorization cards rather than go to an election. The Haerses testified, on the other hand, that they demanded an election.

The Board chose to credit Walters, a decision we cannot overturn under the substantial-evidence standard unless Walter's testimony was "hopelessly incredible . . . or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony," *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); *see NLRB v. Gogin*, 575 F.2d 596, 605 (7th Cir. 1978) (only in "exceptional circumstances" will resolutions of such conflicts in testimony be disturbed on review"). *Omni International Hotels, Inc., v. NLRB*, 606 F.2d 570 (5th Cir. 1979), is not, as the company insists, to the contrary. In *Omni International* the testimony by five persons that they were not hired because of their former union activi-

ties, which the Board credited, was contradicted by the undisputed fact that the employer had hired many union members, including some who had engaged in the same activity as the five witnesses. Moreover, the court in *Omni International* found that the Board's reasons for crediting these witnesses were unsound; the Board did not rely on those reasons in this case.

The company's attacks on Walters's credibility are not telling. It is not unusual for a person to forget the specific words spoken to him six months earlier. Nor does the General Counsel's and union's failure to call two people Walters spoke to about the meeting during the evening of November 28 undermine the testimony's credibility. The two witnesses would have added little, and the company could have called them in any case.

Furthermore, the Board's rationale for believing Walters rather than the Haerses is sound. Walters's testimony about that part of the meeting following his return is more comprehensive and specific than that of the Haerses. Since the Board reasonably concluded that this portion of the meeting was a "substantial segment" of the conversation, it was also reasonable to credit the witness whose account of that segment included several topics of conversation rather than the two topics the Haerses recalled, which could not have consumed a substantial amount of time. In sum, the Board's reliance on Walters's testimony was reasonable; its conclusion that the company voluntarily recognized the union is supported by substantial evidence.

The company next argues that the Board's decision is repugnant to the policies behind sections 7 and 9 of the National Labor Relations Act. Essentially the company contends that because the electoral process is favored, a union should be deemed the exclusive bargaining agent for a group of employees only if it has made a clear and unmistakable showing that the employer recognized the union. This position is without merit. The Board has explicitly rejected it, *see Lyon & Ryan Ford,*

Inc., 246 N.L.R.B. No. 2 (1979), *enforced*, 647 F.2d 745 (7th Cir. 1981); *Jerr-Dan Corp.*, 237 N.L.R.B. 302, 303 (1978), *enforced*, 601 F.2d 575 (3d Cir. 1979), as have the courts, *see NLRB v. Broad Street Hospital and Medical Center*, 452 F.2d 302, 304-05 (3d Cir. 1971); *NLRB v. Brown and Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979). *See also NLRB v. A. Lasaponara & Sons*, 541 F.2d 992, 996 (2d Cir. 1976) ("that Lasaponara never signed the formal Recognition Agreement is immaterial"), *cert. denied*, 430 U.S. 914 (1977), As the Third Circuit explained in *Broad Street Hospital*, the Board's rule is supported by the possibility that rendering the parties unable to rely on the employer's recognition would produce industrial strife and discord. There is, moreover, no basis on which we can review the Board's policy. The company points to no statute that the Board's rule violates, and no indication that the Board lacks authority to adhere to the rule. As the First Circuit stated in *Brown and Connolly*, 593 F.2d at 1374, "[w]e consider such policy matters . . . to be outside our province."

The company also contests the Administrative Law Judge's limitation of its examination of Walters and other witnesses. The ALJ did not, however, abuse his discretion here, *see NLRB v. Baltimore Paint and Chemical Corp.*, 308 F.2d 75, 77-78 (4th Cir. 1962) ("The extent of examination and cross-examination of witnesses rests in the sound discretion of the [ALJ]"), in light of the significance of the information the company was seeking to elicit.

Finding no merit to the company's final argument, we deny its petition to review and grant the Board's cross-application for enforcement of its order.

/s/ William H. Timbers
/s/ James L. Oakes
/s/ Richard J. Cardamone

Appendix B
Decision and Order of the National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 3—CA—9460

PHELPS CEMENT PRODUCTS, INC.

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION

DECISION AND ORDER

On March 9, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and an answering brief,[1] and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclu-

1. We hereby grant the Charging Party's unopposed Motion to correct the transcript.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find totally without merit the Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge, nor do we perceive any evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

sions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Phelps Cement Products, Inc., Phelps, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.
July 21, 1981

/s/ John H. Fanning, Chairman
/s/ Howard Jenkins, Jr., Member
/s/ Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX C
DECISION OF THE ADMINISTRATIVE LAW JUDGE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 3-CA-9460
PHELPS CEMENT PRODUCTS, INC.

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION

Michael Cooperman, Esq., for the General Counsel.
Allan Dabrow, Esq. (Pechner, Dorfman, Wolffe, Rounick & Cabot), of Philadelphia, PA, for the Respondent.
James R. LaVaute, Esq. (Blitman & King), of Syracuse, NY, for the Charging Party.

DECISION

Statement of the Case

RICHARD L. DENISON, Administrative Law Judge: This case was heard at Rochester, New York, on June 18, 19, and 20, 1980, based on an original charge filed by Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region on December 4, 1979, and amended December 20, 1979.[1] The complaint, issued January 11, 1980, alleges that, after having recognized the Union on November 28, the Respondent violated Section 8(a)(5) and (1) of the Act on or about November 29 by refusing, and thereafter continuing to refuse, to bargain collectively with the Union as the exclusive representative of Respondent's employees in an appropriate

1. All dates are in 1979 unless otherwise specified.

unit composed of all garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

As alleged in the complaint and admitted in the answer, as amended, I find that the Respondent is, and has been at all times material herein, a New York corporation having its principal office and place of business at Newark Street, Phelps, New York, where it is engaged in the manufacture, sale, and distribution of building cement blocks, and related products. Annually, in the course and conduct of its business operations, the Respondent purchases, transfers, and delivers to its Phelps plant, sand, gravel, cement, and other goods and materials valued in excess of $500,000, of which goods and materials valued in excess of $50,000 were transported to the Phelps, New York, plant from enterprises outside the State of New York which in turn received said goods and materials directly from states other then the state of New York. I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Respondent is a manufacturer of concrete blocks, and a retail hardware and masonry supplier to

contractors and the general public. Credited testimony by Respondent's President Philip Haers, Jr. described Respondent's operation as follows: Outside suppliers deliver by truck and unload cement for use in the Respondent's automated block machine, attended by a machine operator. This machine manufactures the cement blocks which are then moved on pallets to a kiln by a lift truck driver. The finished blocks are then again moved by yard employees for storage in the yard area until sold. Sales are made and orders are filled by Phelps' sales employees and are delivered by Respondent's drivers utilizing Respondent's own trucks.[2] Credited testimony by William Shattuck, a Phelps block plant employee at the time of the events in question, and James Walters, business representative for Local 43, sets forth the details of the Union's organizational drive. Walters and Shattuck were bowling companions. It was in late October while bowling that Shattuck first approached Walters about the possibility of organizing Phelps. Walters expressed interest, but it was not until early November, after Shattuck assessed dissatisfaction among his fellow employees based on the amount of their annual raise, that Shattuck obtained a supply of authorization cards from Walters and began soliciting signatures in and around the plant.[3] At a union meeting at Shattuck's home on November 13, attended by Shattuck, Joseph Schetrompf, Ernest Tillman and William Leisenring, Walters ex-

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2. The record establishes that the Haers family who compose the principal owners and management of Phelps Cement Products, Inc., also own and operate another company, Phelps Guide Rail, Inc., utilizing totally different management and employees. Phelps Guide Rail, Inc. is not involved in this proceeding.

3. The cards, introduced into evidence without objection, were headed "Authorization For Representation," and contained the wording, "I, the undersigned, hereby authorize the BRICKLAYERS, and ALLIED CRAFTSMEN LOCAL UNION NO. 43, 262 Exchange Street, Geneva, New York, 14456, as my collective bargaining representative for all matters pertaining to wages, benefits, and working conditions."

plained that the purpose of the cards was union representation and to protect their jobs in case anything came up with the Company, because it was unlawful to fire them for union activity. After collecting the cards he secured at the meeting and those obtained by Shattuck earlier, Walters announced that they had a majority and that he would seek recognition from the Company, but that if recognition was denied they only needed 30 percent to have an NLRB election.[4]

On November 28 Walters arrived at the Company at approximately 2 p.m. He was alone. Walters had in his possession 10 authorization cards.[5] Walters entered the Phelps office and asked to see Phil Haers. The man behind the desk, later identified as Charles Haers, inquired concerning Walters' business, and received the response that it was union business. After a minute's delay, while Charles left the reception area and entered the main office, Walters was directed to the office of Philemon Haers, Sr.[6] Walters introduced himself as business representative of Local 43, and stated that he was there representing a majority of Phelps' employees. Haers, Sr. responded, with reference to some papers on his desk, that he was working on a pension plan that had taken many years to develop, which he now supposed was go-

4. None of the employee card signers who testified claimed that they were coerced in any way into signing, or that the card would be used only to secure an election. Those who remembered only being told that the card would protect their jobs also acknowledged that they knew that the card authorized a union to represent them.

5. Counsel for General Counsel introduced into evidence nine authorization cards bearing the signatures of employees Joseph Schetrompf, Frederick E. Little, William C. Leisenring, William M. Shattuck, Jr., Hector Caraballo, Harold McAllister, Orville G. Dates, Ernest Tillman and Ross H. Wilck. I find these cards to be authentic and valid, and, under the circumstances described hereafter, constituted a majority of the employees in an appropriate unit.

6. Philemon Haers, Sr., also frequently referred to as Phil, Sr., was at all times material herein chairman of the Respondent's board of directors. Charles Haers, his brother, was and is employed as Phelps' dispatcher.

ing to go down the drain. Walters answered that this was not necessarily the case, just because the Union represented his employees, since a pension plan and welfare benefits were a matter for collective bargaining. Then Walters stated that he had authorizations from the employees and that Haers, Sr. had the prerogative of either looking at the authorizations and recognizing the Union, or not recognizing them and going to an election. Haers, Sr. stated that he preferred an election. He asked if Guide Rail employees should be included, but Walters replied he understood Guide Rail was a separate corporation currently represented by other unions. Haers, Sr. asked about secretaries, and Walters responded that secretaries were not included in the unit, nor were salespeople. Then Walters asked what was the advantage of going to an election when he had a majority. Walters said that he had 10 cards with him, plus two other employees committed to sign. He stated that if they went to an election it would only delay things, and could result in more difficult negotiations. Then Haers, Sr. asked to see the authorization cards. Walters produced the cards in his possession, placing them on the desk where Haers, Sr. went through them.

Up until this point Walters and Haers, Sr. had been alone in the office, but now Phil Haers, Jr. arrived. He asked what the Bricklayers were doing there. Haers, Sr. answered that the Union had authorizations from a majority of their employees, and wanted to negotiate a contract. Haers, Jr. asked if the Bricklayers normally got "... involved in this type of thing?" Walters answered that they had never represented plant people, but that the employees had come to them and asked for representation and that was how they got involved. He said that it was not unusual for their International to represent other types of workers, and that they had several block plants and even a milk plant. There followed some discussions between the two Haers concerning whether they should accept the authorizations or have an elec-

tion. Haers, Jr. asked his father what he thought, and Haers, Sr. replied that he couldn't see at this point the advantage of going to an election. He said it would only delay things. He stated possibly they were better off with the Bricklayers rather than the Teamsters. After some further conversation between the two Haers speculating about what prompted the employees to want the Union, the Haers went through the authorization cards together. Then Phil Haers, Sr. said he didn't exactly know how many employees were on the payroll at present, and Phil, Jr. asked if they could take 2 or 3 days to think the matter over. Walters said no, that he wanted an answer that day before he left the office. Walters stated that if they were going to recognize the Union, it was fine, but that if they weren't he wanted to petition immediately in the morning for an election. At that point Phil, Sr. asked if Walters would mind leaving the room while he and his son talked the matter over. Walters agreed and went to the outer office as Haers, Sr. called to his payroll clerk to bring in the payroll book. She entered, closing the door, as Walters exited.

After 5 or 6 minutes Walters was invited back inside the office where he found the two men discussing who the unit employees would be. Walters produced a list of employees' names he had compiled, classified by the sections of the plant in which they worked and their payroll numbers.[7] Walters proceeded to read the list of names while the payroll clerk verified it against the payroll book. This comparison revealed only two discrepancies. James Tillman, one of Walters' 10 card signers, had quit his employment at the Company sometime between when he signed the card and Walters' visit to the plant that day. Eric Van Doyan, who was not a card signer, but appeared on Walters' list as a garage employee, was confirmed to be an employee of Guide

7. This list was introduced into evidence as General Counsel's Exhibit No. 3.

Rail. After noting that supervisors, secretaries and clerical workers, and salesmen were not considered part of the unit, Phil Haers, Sr. announced that there were 16 employees.[8]

After the payroll clerk left the room Phil Haers, Jr. inquired about what the next step would be if the Respondent recognized the Union. Walters answered that he would ascertain what the employees' feelings were concerning the Union's contract proposals, and would prepare and forward a basic contract proposal to the Company. Following some further discussion between the Haers with respect to negotiations, Phil Haers, Sr. said "Well, I guess we might as well go ahead and get it over with." At that point the discussion turned to the topic of negotiations. Phil Haers, Jr. expressed concern over beginning negotiations during the Company's busy season immediately prior to the Christmas holidays. He said he would like negotiations to begin, if possible, in January or February, and then in the evening. Walters answered that by the time he had assembled an employee bargaining committee, and had formulated and forwarded their contract proposals to the Company, with an opportunity for the Haers to review those proposals, it would more than likely require that the first meeting be held sometime in January. Walters emphasized that he did not want to interfere with the Company's operations. After answering some questions from the Haers with respect to why the employees wanted a union, Walters asked if they had any written information on company benefits. Phil Haers, Sr. described the existing employee

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8. These were garage employees Harold Smith and Wayne Stone; truckdrivers Fred Sapp, Thomas Rieke, Walter Jaycox, Issac Suwyn, Joseph Schetrompf, and Harold McAllister; plant employees Hector Caraballo, William N. Shattuck, Jr., and Orville Dates; and yard employees William Leisenring, Ernest Tillman, Ross Wilck, and Fred Little. The 16th employee, whom Walters could not remember since that name did not appear on his list, was raised by the Company during the examination of the payroll book.

benefits. Phil Haers, Jr. promised to try to locate an extra copy of the Company's pension, profit-sharing, and welfare program which he would forward to Walters. Then Phil Haers, Sr. said "Just because we agree to negotiate does not mean we have to accept their proposals." Walters responded this was true, proposals were a matter for negotiations, and that Local 43's other contracts contained a binding arbitration provision in the event of a bargaining impasse. He said, if it was acceptable to the Haers, they could do the same thing in these negotiations, and both company officials expressed interest in this idea. The meeting adjourned, and Walters left the office at about 20 minutes until 5 p.m.

In their testimonies Phil Haers, Sr. and Phil Haers, Jr. denied that they agreed to recognize the Union during the meeting with Walters on November 28. Both men insisted that throughout the course of the meeting they consistently took the position that the bargaining unit was larger than 16 employees, and that all eligible employees should have an opportunity to vote in an election. They testified that the authorization cards, which they counted, were Xerox copies of handwritten authorizations, which did not contain either the name of the Union or the heading "Authorization For Representation." Philip Haers, Jr. conceded, however, that at some point in the meeting his father stated that they would be better off with Walters' union than the Teamsters, and also said that just because he recognized the Union it would not mean that he had to accept their proposals. Both Haers agreed that the conference with Walters lasted in the vicinity of 2 hours and that the discussion covered a wide variety of topics as Walters attempted" . . . to sell us on the Union." Phil Haers, Jr.'s testimony noticeably omits any details of that portion of the conference which took place following the discussion of which employees, based on the payroll book, should be included in the bargaining unit. This was the portion of

the meeting in which Walters testified the subject of commencing negotiations was discussed. Likewise, Phil Haers, Sr. in his testimony, omitted any detailed reference to this substantial segment of the conference, until elicited by Respondent's counsel by a leading question. Therefore, in all cases where their respective testimonies conflict, I credit Walters' more detailed and comprehensive version, and find that the Respondent recognized the Union during the November 28 meeting as collective-bargaining representative for an agreed upon 16-employee unit composed of garagemen, truckdrivers, and plant and yard employees, as alleged.

It is undisputed that immediately following the November 28 meeting with Walters, Phil Haers, Sr. and Phil Haers, Jr. convened a special meeting of the board of directors. Phil Haers, Jr. told the assembled members Walters had been there, and" . . . that he had cards with the signatures of the employees, wanting them as their representative; and there has to be a decision made whether to accept that on that basis or a decision made whether to give all the employees a chance to vote." After some deliberation, the meeting ended with Phil, Jr. being instructed to note to call Walters the following day and tell him that the Company wanted an election. Phil Haers, Jr. talked to Walters by telephone the following morning. In response to his statement that there would have to be an election. Walters replied "I don't think you can do that. I will see about that." Walters then stated that he would have to contact his attorney, and the conversation ended.[9] It is therefore clear, and I find, that the Respondent reneged on its original recognition of the Union as exclusive collective-bargaining agent for an appropriate unit of the Respondent's employees. Thus, the Respondent violated Section 8(a) (5) and (1) of the

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9. Based on an amalgam of the credited testimony of Walters and Phil Haers, Jr.

Act.[10] *Lyon & Ryan Ford, Inc.*, 246 NLRB No. 2; *Jerr-Dan Corp.*, 237 NLRB 302.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Beginning on November 13, the Union represented a majority of the employees in the appropriate unit described above in paragraph 3, and has been, and is, the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. On November 28 the Respondent recognized the Union as the representative for purposes of collective bargaining of the employees in the appropriate unit described in paragraph 3.

6. By withdrawing recognition from and refusing to bargain collectively with the Union as exclusive collective-bargaining representative of the employees described in the appropriate unit set forth above in paragraph 3, beginning November 28 and continuing to date, the Respondent engaged in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

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10. Having found that the Respondent did in fact recognize the Union on November 28, and that the 16-man unit discussed in the Walters-Haers conference is an agreed upon appropriate unit, I find it unnecessary to decide whether or not, based on their credited testimony concerning their duties, Phelps' employees Earl Hence, Charles Haers, Michael Melito, and Charles Burmaster, should also be included in the unit.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent withdrew its recognition of the Union and refused to bargain collectively in good faith with the exclusive representative of its employees in the appropriate unit described herein, I shall order the Respondent to restore recognition to and, upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement. Because the character of the Respondent's unfair labor practices was clearly directed towards the destruction of any collective-bargaining relationship with the Union, I find a broad cease and desist order is necessary. In addition, the Respondent will be ordered to post an appropriate notice encompassing the violations committed.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

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11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Respondent, Phelps Cement Products, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize, meet, and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.[12]

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Restore recognition to, and, upon request, bargain with Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region, as the exclusive collective-bargaining agent of the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Phelps, New York, plant copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Di-

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12. The appropriate collective-bargaining unit is:

All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

13. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

rector for Region 3, after being duly signed by an authorized representative of the Respondent, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. March 9, 1981

Richard L. Denison
Administrative Law Judge

Appendix D
National Labor Relations Act
29 U.S.C. §§ 151, 157, 158(a) (5), and 159(c)

Section 151
FINDINGS AND DECLARATION OF POLICY

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 157
RIGHT OF EMPLOYEES AS TO ORGANIZATION

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

Section 158
UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 159
REPRESENTATIVES AND ELECTIONS

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board — (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

82-253

In The

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-[illegible]253

PHELPS CEMENT PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION,

Intervenor.

BRIEF OF INTERVENOR BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err by applying the substantial evidence standard of review, instead of a "clear and convincing" evidence standard urged by the employer, in upholding the National Labor Relations Board's determination that petitioner Phelps Cement Products, Inc. violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(5) and (1), by withdrawing recognition from the Union and refusing to bargain?

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-100253

PHELPS CEMENT PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION,

Intervenor.

BRIEF OF INTERVENOR BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks review of a decision by the United States Court of Appeals for the Second Circuit which enforced the National Labor Relation Board's order directing that Phelps Cement Products, Inc. [the "Company"] cease and desist from, *inter alia,* refusing to recognize and bargain collectively with intervenor Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region [the "Union"].[1] The Union opposes the issuance of a writ of certiorari to review the Court of Appeals' decision because the decision below, that the Board's order was supported by substantial evidence, was clearly correct and there is no conflict among the circuits on an issue herein requiring resolution by this Court.

[1]The Union, as the charging party and successful party in the Board proceeding, was granted intervention by the Court of Appeals.

OPINIONS BELOW

References to the opinions and judgments delivered in the proceedings below are set forth in the petition at page 1.

JURISDICTION

The alleged jurisdictional requisites are set forth in the petition at page 2.

STATUTORY PROVISIONS INVOLVED

Sections 1, 7, 8(a)(1), 8(a)(5), 9(e), 9(f), 10(e), and 10(f) of the National Labor Relations Act, as amended, ["NLRA" or the "Act"], 29 U.S.C. §§151, 157, 158(a)(1), 158(a)(5), 159(e), 159(f), 160(e), and 160(f), are reprinted at IA-1 to IA-6 of the appendix to this brief.

STATEMENT OF THE CASE

Nature of the Case.

Petitioner Phelps Cement Products, Inc. seeks review of the decision of the United States Court of Appeals for the Second Circuit which enforced the order of the respondent National Labor Relations Board [the "Board"] against the Company. The Board adopted the recommended order of its Administrative Law Judge and directed the Company to cease and desist from, *inter alia*, refusing to recognize and bargain collectively with intervenor Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region.[2] Upon consideration of the Company's petition to review and set aside the order of the Board, the Court of Appeals found that the Board's order was supported by substantial evidence on the record considered as a whole and, therefore, granted the Board's cross-application for enforcement of the order.

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[2]Phelps Cement Products, Inc., 257 NLRB No. 4 (1981).

Course of the Proceedings Before the Board.

The complaint before the Board alleged that the Company violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain, after having voluntarily recognized the Union and its majority status in an agreed upon bargaining unit on or about November 28, 1979.[3] After a trial, the Board's Administrative Law Judge concluded that the Company had voluntarily recognized the Union in an appropriate agreed upon bargaining unit, and that the Company had thereafter unlawfully withdrawn recognition and refused to bargain in violation of Sections 8(a)(5) and (1) [C.10].[4] The Board, by order dated July 21, 1981, adopted the Judge's decision in its entirety [B-1 to B-2].[5]

The Decision of the Court of Appeals.

The Company petitioned the United States Court of Appeals for the Second Circuit to review and set aside the order of the Board. The Board cross-petitioned for enforcement of its order. The Court of Appeals unanimously denied the Company's petition for review and granted the Board's cross-application for enforcement of its order. The Court of Appeals held that the Board's conclusion that the Company had voluntarily recognized the Union is supported by substantial evidence. In granting enforcement, the Court of Appeals declined the Company's invitation to impose a "clear and convincing" standard of evidence, rather than the "substantial evidence" standard, in reviewing Board determinations of voluntary recognition.

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[3]The Company admitted that the Union had requested the Company to bargain beginning on or about November 29, 1979.

[4]References in this form are to pages of the decision of the Administrative Law Judge, reprinted at Appendix C to the petition.

[5]Additionally, the Board granted the Union's motion to correct the transcript of the hearing. [B-1 n.1].

The Company's subsequent petition for rehearing and rehearing en banc was denied by the Court of Appeals. On August 12, 1982, the Company applied for a writ of certiorari to this Court seeking review of the Court of Appeals' decision.

The Facts.

In late October and November of 1979, James Walters, Business Representative of Local 43, was approached by an employee of the Company concerning the Union's possible organizing of the Company's cement block plant [C-3]. The employee, William Shattuck, explained that the men were talking about getting a union if they did not receive a sufficient wage increase. When the annual increase came out in November, most of the employees only received $.10 an hour. They were dissatisfied and went back to the Union and asked for representation [C-3]. Walters thereafter gave Shattuck authorization cards, told him the cards were to authorize the Union as the employees' collective bargaining representative, and said that if the employees wanted the Union to represent them they should sign the cards [C-3 n.3].

Shattuck returned the signed cards to Walters on November 13, 1979, at a meeting held at Shattuck's house that evening. Employees Shattuck, Schetrompf, Leisenring and Ernest Tillman, all employed by the Company, were present at the meeting. Schetrompf, Leisenring and Tillman signed their cards in the presence of James Walters [C-4]. At the meeting, Shattuck also gave Walters the remaining cards for which he had previously obtained employee signatures. By that time, there were nine cards signed by employees of the Company; those cards were introduced in evidence by the Board's General Counsel at the trial [C-4 n.5]. All these cards were either signed prior to or at the meeting at Shattuck's house on November 13.[6]

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[6]The cards in evidence are as follows: 2-A, Joseph Schetrompf; 2-B, Frederick Little; 2-C, William Leisenring; 2-D, William Shattuck; 2-E, Hector Caraballo; 2-F, Harold McAllister; 2-G, Orville Dates; 2-H, Ernest Tillman; 2-I, Ross Wilck.

On November 28, 1979, Walters went to the Company's offices around 2:00 or 2:15 p.m. He asked to see Phil Haers [C-4]. Walters was told that Phil Haers, Sr. (Philemon Haers) was in.[7] After Walters identified himself, he was shown into Phil Haers, Sr.'s office and met with him alone. Walters told Haers that he had signed authorizations from employees and wanted to represent the Company's production and maintenance employees [C-4]. The two men discussed the options of an election or voluntary recognition. Walters told Haers that secretaries, clericals and sales people were not going to be in the collective bargaining unit. About 45 minutes after the meeting started, Haers asked to see the authorization cards. Walters placed the cards on Haers' desk and Haers reviewed them [C-5].

At that time Philip Haers, Jr. entered the office.[8] Walters told Haers, Jr. that the Union represented a majority of the employees, had the authorization cards and wanted to negotiate a contract [C-5]. The Haers discussed back and forth whether they should voluntarily recognize the Union or have an election. They both went through the cards again and brought in the payroll clerk to check the payroll records [C-6]. There was discussion concerning who the unit employees would be. Walters read off a list of names he had compiled of the men who worked in the unit he was seeking.[9]

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[7]The correct name is Philemon Haers, commonly referred to as Phil Haers Sr., to distinguish him from his son, Philip Haers, who is referred to as Phil Haers, Jr. Philemon Haers, Sr. was at that time and is now Chairman of the Company's Board of Directors, and was in the plant every day [C-4 n.5].

[8]Philip Haers, Jr. is President of Phelps and serves on its Board of Directors.

[9]The names that were stated as being in the unit are all those on the list except Van Doyen, who in fact was not employed by Phelps, James Tillman, who had quit [C-6 to C-7], Earl Hence, a salesman, Hundley, a stipulated supervisor, and Burmaster, partially retired and identified as not being in the unit.

Walters read the list of his names to the payroll clerk who verified that they were employees.[10] Walters identified the garage mechanics, yard workmen, plant people and drivers as the people on the list and in the unit. Walters reiterated that supervisors, secretaries, clericals, salesmen and immediate family members were not part of the unit. The parties agreed on the employees who were in the unit.[11]

Walters and the Haers then discussed the negotiations for a contract. Phil Haers, Jr. expressed concern over beginning negotiations during the Company's busy season immediately prior to the Christmas holidays. He said that he would like negotiations to begin, if possible, in January or February. He also requested that negotiations be conducted during the evening so as not to interfere with business [C-7]. Walters said that by the time he had assembled an employee bargaining committee, and had formulated and forwarded their contract proposals to the Company, with an opportunity for the Haers to review those proposals, it would probably be after the first of the year [C-7]. Walters emphasized that he did not want to interfere with the Company's operations.

Walters then asked for written information on the Company's existing employee benefit plans. Haers, Jr. promised to try to locate an extra copy of the Company's pension, profit sharing and welfare plans and forward them to Walters [C-8]. It was agreed that the Union would prepare some proposals after talking with the employees and that negotiations would begin when Walters got the proposals together. The men shook hands on it and Walters left.

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[10]Philip Haers, Jr. verified that the unit employees — Smith, Stone, Sapp, Rieke, Jaycox, Suwyn, Schetrompf, McAllister, Caraballo, Shattuck, Dates, Leisenring, Ernest Tillman, Wilck, and Little were all employed by Phelps on November 28, 1979.

[11]There are fifteen employees identified by name as being in the unit. Walters testified that Haers Sr. referred to the number sixteen as the number of people employed by Phelps, but the identity of a sixteenth employee is unclear [C-7 n.8]. In any event, at the end of the meeting there was no question left as to who was in or out of the unit — "mechanics, yard people, plant workers and drivers. That was the unit."

The following morning, Phil Haers, Jr. called Walters and told him that the Company's Board of Directors had a meeting and had changed their mind and wanted an election. Walters told Haers, Jr. that he did not think the Company could do that at this point and told him that he would be contacting his attorney. The original charge was filed with the Board shortly thereafter.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court's discretionary review of decisions of the United States Courts of Appeals by writ of certiorari is generally limited to cases: where there is a conflict among the circuits on the same matter; where an important issue of federal law is presented which has not been, but should be, settled by this Court; or where a federal question has been decided in a way that conflicts with applicable decisions of this Court.[12] As more fully discussed hereinafter, the above reasons for granting certiorari are totally absent in the instant case. It is submitted, therefore, that there is no legal issue warranting certiorari.

First, there is no conflict among the circuits on an issue herein. The Second Circuit enforced the Board's decision that the Company had voluntarily recognized the Union and, thereafter, unlawfully withdrew recognition in violation of Sections 8(a) (1) and 8(a) (5) of the NLRA. That decision fully accords with decisions of the other courts of appeals. The circuit courts have uniformly enforced the established Board rule that once an employer recognizes a union as the exclusive bargaining representative of its employees, it is a violation of the Act to withdraw recognition before a reasonable effort has been made to bargain.[13] Moreover, the Second Circuit's refusal

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[12] *See* Rule 19(b)(1) of the Supreme Court Rules.

[13] *Lyon & Ryan Ford, Inc.*, 647 F.2d 745 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (1981); *Jerr-Dan Corp.*, 601 F.2d 578 (3d Cir. 1979), *enf'g* 237 NLRB 302 (1978); *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979); *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *NLRB v. Broad Street Hospital*, 452 F.2d 302 (3d Cir. 1971); *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367 (9th Cir. 1969).

to review or interfere with the Board's rule on voluntary recognition is consistent with this Court's admonition against judicial interference in matters of national labor policy.[14]

Second, there is no important question of federal law which has not been, but should be, settled by this Court. The Second Circuit granted enforcement of the Board's order based on its finding that the order was supported, on the entire record, by substantial evidence. The applicability of the substantial evidence standard to court review of Board decisions is specifically provided for in the Act.[15] and has been recognized and followed by this Court for more than thirty years.[16]

Third, the Court of Appeals' decision fully accords with previous decisions of this Court. Indeed, the Company's argument, rejected by the court below, that a special evidentiary test should be applied in voluntary recognition cases is directly contrary to this Court's decision in *NLRB v. Walton Manufacturing Co.*[17]

Finally, the decision in this case turned solely on the evaluation of testimony of the various witnesses. Since the Court of Appeals' upholding of the Administrative Law Judge's credibility findings is consistent with the established scope of judicial review and is fully supported by the record, review by this Court is not appropriate.[18]

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[14] *Phelps Dodge v. NLRB*, 313 U.S. 177, 194 (1941).

[15] 29 U.S.C. §160(e).

[16] *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

[17] 369 U.S. 404 (1962).

[18] *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

ARGUMENT

POINT I

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW IN ENFORCING THE BOARD'S ORDER.

It is established law that decisions of the National Labor Relations Board are entitled to enforcement by the courts of appeals if supported by substantial evidence on the record considered as a whole. In the instant case, the Court of Appeals granted enforcement based on its determination that the Board's order was, on the entire record, supported by substantial evidence. Thus, since the court below properly applied the congressionally mandated standard of review in enforcing the Board's order, the petition for writ of certiorari must be denied.

In drafting the National Labor Relations Act,[19] Congress specifically limited the scope of judicial review of Board decisions. Pursuant to the Act, so long as the Board's findings are supported on the entire record by substantial evidence, the reviewing court is without power to set aside the Board's decision. Thus, Section 10(e) of the Act provides, in part, that:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.[20]

In *Universal Camera Corp. v. NLRB*,[21] this Court, upon reviewing the legislative history and background underlying the

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[19] 29 U.S.C. §§141 *et. seq.*

[20] 29 U.S.C. ¶160(e).

[21] 340 U.S. 474 (1951).

statutorily prescribed substantial evidence standard, explained that:

> *To be sure the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.* Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.[22]

In applying the standard of review articulated in *Universal Camera*, the Court of Appeals found that "the Board's . . . conclusion that the Company voluntarily recognized the union is supported by substantial evidence" [A-3]. Although apparently not disputing that the Board's decision is supported by substantial evidence, the Company urges that this Court disregard the substantial evidence test and impose a more onerous burden of proof in voluntary recognition cases. Thus, the Company seeks a rule requiring that the Board adduce "clear and convincing" evidence to support a finding of voluntary recognition.

The Company's argument for imposition of a special rule concerning the weight of the evidence necessary to sustain a

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[22] *Id.* at 488 [emphasis supplied]. The Court in *Universal Camera* had previously held that the "substantial evidence" standard of proof required of Board decisions by the National Labor Relations Act, as amended, is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act, 5 U.S.C. §1001 *et seq.* *Id.* at 487.

Board order of voluntary recognition is without merit. In *NLRB v. Walton Manufacturing Co.*,[23] this Court specifically rejected imposition of a similar special rule in reinstatement cases and held that the substantial evidence standard articulated in *Universal Camera* is applicable without exception to review of all Board decisions. In *Walton*, the Court rejected a special evidentiary rule applied by the United States Court of Appeals for the Fifth Circuit in reviewing Board orders involving reinstatement with back pay.[24] Finding such a special

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[23]369 U.S. 404 (1962).

[24]The Fifth Circuit's special evidentiary rule in reinstatement cases was first announced in *NLRB v. Tex-O-Kan F. Mills Co.*, 122 F.2d 433 (1941). In that case, the court said that a cease-and-desist order generally "costs no money and only warns to observe a right which already existed; evidence short of demonstration may easily justify such an order. *Id.* at 438. But the court established a stricter rule for reinstatement cases:

> Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough. The duty to weigh and test the evidence is of course on the Board. This court may not overrule a fact conclusion supported by substantial evidence, even though we deem it incorrect under all the evidence. . . . In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to reemploy in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true and the discharger knows the real cause of discharge, it is a fact to which he may swear. *If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point.*

Id. at 438-39 [emphasis supplied].

rule impermissible, this Court declared that:

> There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases. *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, and the *Universal Camera Corp.* case state a rule for review by the Courts of Appeal in all Labor Board cases.[25]

Additionally, as held by the court below, the Company's argument that policy considerations justify judicial abrogation of the Board's rule regarding informal recognition is without support.[26] In *Phelps Dodge Corp. v. NLRB*,[27] this Court cautioned against judicial intrusion into the area of Board policy. The Court said:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empirical process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

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[25] 369 U.S. at 407.

[26] In rejecting the Company's argument that policy considerations favoring the electoral process warrant imposition of a more stringent evidentiary rule to support a Board finding of voluntary recognition, the Court of Appeals said that:

> There is, moreover, no basis on which we can review the Board's policy. The company points to no statute that the Board's rule violates, and no indication that the Board lacks authority to adhere to the rule. "[W]e consider such policy matters . . . to be outside our province."

A-4 to A-5 [*quoting NLRB v. Brown and Connolly, Inc.*, 593 F.2d 1373, 1374 (1st Cir. 1979)].

[27] 313 U.S. 177 (1941).

> *Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.*[28]

It is clear that, pursuant to this Court's decisions in *Universal Camera* and *Walton Manufacturing*, the Company's argument for application of a more stringent evidentiary standard in voluntary recognition cases was properly rejected by the court below. Accordingly, since the Court of Appeals applied the correct standard of review — the substantial evidence test — in enforcing the Board's order, the petition for writ of certiorari should be denied.

POINT II

THE COURT OF APPEALS CORRECTLY FOUND THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S DETERMINATION THAT THE COMPANY HAD RECOGNIZED THE UNION AS BARGAINING REPRESENTATIVE FOR AN AGREED UPON UNIT.

More than three decades ago, in *Universal Camera Corp. v. NLRB*,[29] this Court articulated the very narrow circumstances in which certiorari would be granted to review a Court of Appeals' decision to grant or deny enforcement of a Board order. The Court observed that:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.[30]

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[28] *Id.* at 194 [emphasis supplied].

[29] 340 U.S. 474 (1951).

[30] *Id.* at 490-91.

Similarly, in *NLRB v. Pittsburgh Steamship Co.*,[31] decided the same day as *Universal Camera*, the Court emphasized that it would not review decisions, such as that in the instant case, turning solely on evaluation of testimony. The Court explained that:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals . . . finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."[32]

In the instant case, the determination of whether the Company agreed to recognize the Union turned on whose testimony was to be credited. The administrative law judge, confronted with two conflicting versions of events, credited the testimony of Union Representative Walters over that of the Company's witnesses. In a similar situation, the court in *NLRB v. Gogin*[33] refused to disturb the Board's credibility findings. The court enforced the Board's order that the employer refused to bargain with a union that possessed authorization cards from a majority of unit employees, by withdrawing recognition previously granted to the union in a telephone conversation between the union representative and the employer's attorney.[34]

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[31] 340 U.S. 498 (1951).

[32] *Id.* [quoting *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927)].

[33] 575 F.2d 596 (7th Cir. 1978).

[34] *Id.* at 605.

The employer contended that the Board should not have credited the testimony of the union representative over the testimony of the company's witness. The court summarily rejected that invitation:

> The company asks this court to disturb the findings of the Board in crediting the testimony of [the union representative] over that of [the company] Attorney Hauer. We decline to do so on the basis that absent exceptional circumstances, such resolutions are within the province of the trier of the fact, and will not be disturbed on review.[35]

In the instant case, the crediting of Walters' testimony over that of the Haers is fully supported by the record. The testimony of Phil Haers Sr. and Jr. was at times incredible, conflicting and inconsistent. Moreover, their counsel attempted to lead them in critical areas.[36] Conversely, Walters' testimony, credited by the Judge, was given in direct fashion without leading questions. Also, contrary to the Company's contention, Walters' recollection was not incomplete or vague. He never claimed that the Company's recognition was given in the explicit words that it "hereby recognizes the Union." Rather, he testified forthrightly to all that was discussed in the meeting, concluding with the discussion about the negotiations. Bargaining, of course, presumes recognition. The Company's arguments about the form the grant of recognition took would

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[35] *Id.; accord, NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952); *see, also, NLRB v. Stark*, 525 F.2d 422, 425-26 (2d Cir. 1975); *Amalgamated Local 355 v. NLRB*, 481 F.2d 996, 1005 (2d Cir. 1973); *NLRB v. Warrenburg Board & Paper Corp.*, 340 F.2d 920, 922 (2d Cir. 1965).

[36] Contrary to the Company's contention, the Administrative Law Judge correctly noted that Philemon Haers, Sr. "omitted any detailed reference to [a] substantial segment of the [meeting on November 28], until elicited by Respondent's counsel by a leading question" [C-9]. The record fully supports that conclusion.

require a degree of formality in the recognition process repeatedly rejected by the courts.[37]

Also, the Company's contention that the Board's order should not be enforced because the Judge refused to allow cross-examination about a conversation between Walters and the Union's attorney, subsequent to the meeting between Walters and the Haers on November 28, is without merit. The Judge's findings, adopted by the Board, that the Company recognized the Union, and his crediting of Walters over the Haers, were based on a comparison of their testimony about the November 28 meeting. Testimony about events and conversations after the meeting was limited by the Judge, and the limitations applied to the General Counsel and the Union as well as the Company. The subsequent events were not relied on by the Judge in making his fact resolutions.

Other complaints by the Company about the conduct of the hearing and alleged improper limiting of questioning by the Company's counsel are equally without merit. The Judge would not allow the Company's counsel to question Union Business Representative Walters about previous organizing activities. This line of questioning, however, was outside the scope of direct examination and unrelated to the events at issue. The Judge restricted the other parties in the same fashion. Thus, he would not allow the Union to cross-examine Philemon Haers as to his familiarity with unions, notwithstanding his testimony on direct examination that he did not know how to

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[37] *NLRB v. Broad Street Hospital*, 452 F.2d 302, 304-05 (3d Cir. 1971); *NLRB v. Brown & Connolly*, 593 F.2d 1373, 1374 (1st Cir. 1979). In *Brown & Connolly*, the Board found that the arrangement of a meeting to begin negotiations, as occurred in this case, left no doubt that the employer had, in fact, accepted the representative status of the union. 237 NLRB 271, 275 (1978).

The Board, with court approval, has long rejected the argument that collective bargaining contracts must be formally attested by the parties. In *Conway's Express v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952), the court noted:

> §8(d) [29 U.S.C. §158(d)], codifying the rule of H.J. Heinz Co. v. NLRB, 311 U.S. 514, specifically provides for a written agreement "if requested by either party" — clear evidence that a writing is not mandatory as a matter of law.

deal with the Union's request for recognition because it was a "new thing" and they had not had union activity "there" for 22 years.

The record in this case plainly contains substantial evidence to support the Board's determination that the Company recognized the Union. Moreover, the Company has failed to demonstrate that the Administrative Law Judge's credibility findings were contradicted by documentary evidence or were otherwise improper. Accordingly, the Court of Appeals' enforcement of the Board's order was proper and the petition for certiorari should, therefore, be denied.

POINT III

AS FOUND BY THE COURT BELOW, THE BOARD PROPERLY DETERMINED THAT THE COMPANY'S ACTIONS VIOLATED SECTIONS 8(a) (5) AND (1) OF THE ACT.

The Board has repeatedly held, with court approval, that oral recognition of a collective bargaining representative is as effective as Board certification, and that such oral recognition must be enforced. Accordingly, in the instant case, the Company's repudiation of its prior oral recognition of the Union was in violation of the Act.

In *NLRB v. Broad Street Hospital*,[38] the court affirmed a Board finding that the employer violated the Act by withdrawing recognition of the union it had orally recognized. The court noted that the issue involved "the weighing of two conflicting goals of national labor policy: preserving employees' free choice of bargaining representatives, and providing stability for established bargaining relationships." The court found that, in such a situation, "'the Board should be left free to utilize its administrative expertise in striking the proper balance.'"[39] The court noted the different con-

[38] 452 F.2d 302 (3rd Cir. 1971).

[39] *Id.* at 304, citing its previous decision in *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970).

siderations involved, and concluded that the danger of instability in bargaining relationships was paramount.[40] The court also concluded that "the objectives of our national labor policy [would be] thwarted . . . if the judiciary were to impose formalisms in the recognition process not deemed necessary by the Board. . . . So long as the Board is willing and able to determine the *fact* of recognition from the entire record, the judiciary should not dilute the efficacy of the Board's action."[41]

The views of the court in *Broad Street Hospital* were adhered to by the Second Circuit in *NLRB v. Lasaponara & Sons*,[42] reiterating that "[o]nce a collective bargaining agent is

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[40]The Third Circuit in *Broad Street Hospital* stated that:

> We respect the fundamental principles that employees should be given maximum opportunity to select or reject bargaining representatives, and that trade union representation must reflect the will of the bargaining unit fairly achieved through democratic processes. Indeed, it is unrealistic not to recognize that there are points in time in a given labor dispute when a particular union can be said to have lost its majority status. . . .
>
> However, it is precisely under such conditions that the dangers of instability, wrought by the absence of an established bargaining unit, are most severe. Thus, whether the employer's bona fide recognition of a union's majority status be oral or written, it must be binding for the same reasons we enunciated in Frick: the inability of all parties to the collective bargaining process to rely on such recognition would produce an uncertainty potentially generative of strife and discord in industrial relations. Furthermore, the very real possibility of employer interferences with established majority status would exist. In fact, in implementing the congressional prohibition against unfair labor practices, the Board, with Supreme Court approval, "many times has expressed the view that unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

452 F.2d at 304-05.

[41]*Id.* at 305.

[42]541 F.2d 992, 995 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977).

voluntarily recognized by an employer as the representative of its employees, the bargaining relationship must be permitted to continue and recognition may not be withdrawn at will."

Similarly, in *NLRB v. Brown & Connolly, Inc.*,[43] the court recognized, consistent with the above decisions, that "if the employer once recognizes a majority union, no matter how informally, the Board holds that the right [to require an election] is lost."[44] In *Brown & Connolly*, the employer orally recognized the union after he was confronted by eleven of his seventeen employees, with two union organizers, who appeared at his office, unannounced and wearing union buttons. The Board found that this was a demonstrable showing of majority status, rejecting the arguments that there was no meeting of the minds at the meeting and no agreement by the employer to enter into a collective bargaining relationship.

In finding a violation in the instant case, the Board relied on its previous decisions in *Lyon & Ryan Ford, Inc.*,[45] and *Jerr-Dan Corp.*,[46] both of which have since been enforced by the circuit courts. The Board in *Jerr-Dan* rejected the conclusion of the administrative law judge that recognition ought to be reduced to writing or accompanied by unambiguous objective conduct confirming the recognition, such as the actual entry into contract negotiations, before a violation should be found in a party's withdrawal from that recognition.[47] Since credited testimony in *Jerr-Dan* showed the employer's recognition of

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[43] 593 F.2d 1373 (1st Cir. 1979).

[44] *Id.* at 1374.

[45] 246 NLRB 1 (1979), *enf'd*, 647 F.2d 745 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (1981).

[46] 237 NLRB 302 (1978), *enf'd in unpublished opinion*, 601 F.2d 578 (3d Cir. 1979).

[47] *Id.* at 302.

the union, it was sufficient to show a violation of the Act.[48] The Board held that no further evidence was necessary:

> [T]he key is the original commitment of the employer to bargain upon some demonstrable showing of majority. That showing was made here by the union and that commitment was made by respondent when it agreed to begin bargaining. Once that commitment was made, respondent could not unilaterally withdraw its recognition and to do so was a violation of the Act.[49]

In *Jerr-Dan*, as in the instant case, there was an initial recognition of the union by the employer and agreement to begin bargaining; but on the day following that recognition, the employer notified the union that it doubted the union's majority status, questioned the authorization cards and raised doubts as to the appropriate unit. The Third Circuit upheld the Board's determination that such a withdrawal of recognition constituted a violation of Section 8(a) (5) of the Act.

In the instant case, the credible evidence shows that on Nove..ber 28, 1979, the Company, by its officers Philemon Haers and Philip Haers, Jr., recognized and agreed to bargain with the Union, upon a demonstrable showing of majority status — the signed authorization cards — in an agreed upon unit consisting of named garage employees, truck drivers, plant employees, yard employees and excluding supervisors, salesmen, clericals and Haers' family members. Philemon Haers and Philip Haers, Jr. reviewed the signed authorization cards and accepted their authenticity. Immediately thereafter, the parties agreed to commence negotiations after the Union forwarded its contract proposals.

The Company's contention that the Board decision is repugnant to the national labor policy favoring free choice in NLRB elections is misplaced. That policy is inapplicable in a situation where recognition has already been afforded. As

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[48] *Id.* at 303 n.9.

[49] *Id.* at 303.

recently pointed out by the court in *NLRB v. Lyon & Ryan Ford*,[50] an election is not the only method by which a bargaining relationship can be established, and, that:

> [a]n employer's voluntary recognition of a majority union remains 'a favored element of national labor policy.' *NLRB v. Broadmoore Lumber Co.*, 578 F.2d 238, 241, 98 LRRM 3134 (9th Cir. 1978). An employer who has not committed unfair labor practices and has not recognized a union has the right to require an election regardless of the union's showing of majority status. *But once the employer recognizes the union, no matter how informally, he loses the right to require an election.*[51]

Since the Company voluntarily recognized the Union, its contention that this Court's decision in *Linden Lumber*[52] requires reversal of the Board's decision in this case is totally misplaced. The Court in *Linden Lumber* carefully noted that the employer and union "had never voluntarily agreed upon any mutually acceptable and legally permissible means other than a Board-conducted election for resolving the issue of union majority status."[53] As indicated by the numerous voluntary recognition cases decided by the Board and enforced by the Courts of Appeals since *Linden*, that decision is inapplicable to this situation.

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[50] 647 F.2d 745 (7th Cir. 1981).

[51] *Id.* at 750-51 [emphasis supplied].

[52] *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

[53] *Id.* at 310 n.10.

POINT IV

THE BOARD PROPERLY DETERMINED THE APPROPRIATE UNIT IS THE ONE IN WHICH THE UNION WAS RECOGNIZED BY THE COMPANY.

The Company contends that the Board's order must be reversed because the Board failed to make a determination of the appropriate bargaining unit. That contention is incorrect. The Board specifically found that the unit discussed in the November 28 meeting was an agreed upon unit and, therefore, appropriate.

This Court has long recognized that determination of an appropriate bargaining unit is within the sound discretion of the Board. Accordingly, unless the Board's unit determination is so unreasonable and arbitrary as to exceed its power, the determination may not be disturbed by the courts. Thus, in *Packard Motor Car Co. v. NLRB*,[54] this Court held that:

> The issue as to what unit is appropriate for bargaining is one for which no absolute law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed.[55]

The Board's deferring to the parties' agreed upon unit in this case was fully consistent with long-standing Board policy. The Board has repeatedly held that the unit agreed upon is to be respected and is controlling.[56] In the instant case, the Board found that the Company recognized the Union as the representative of employees in a unit consisting of garage employees, truck drivers, plant employees and yard employees.

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[54] 330 U.S. 485 (1947).

[55] *Id.* at 491; *see South Prairie Construction Co. v. Engineers*, 425 U.S. 800, 805 (1976).

[56] *R.L. Sweet Lumber Co.*, 207 NLRB 529, 535 (1973), *enf'd* 515 F.2d 785 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975); *Buckley Southland Oil*, 210 NLRB No. 145 (1974); *Ref-Chem Co.*, 169 NLRB 376, 380 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969); *NLRB v. Royal Oak Tool & Machine Co.*, 320 F.2d 77 (6th Cir. 1963).

Since this is the "unit in which the Union was afforded recognition," it is "unquestionably appropriate."[57]

Furthermore, the unit is one traditionally recognized by the Board as appropriate, being a production and maintenance unit. In conjunction with the parties' agreement on the classifications involved, the employees in the unit were identified by name: Harold Smith and Wayne Stone, mechanics; Fred Sapp, Thomas Ricke, Walter Jaycox, Issac Suwyn, Joseph Schetrompf, and Harold McAllister, truck drivers; Hector Caraballo, William Shattuck and Orville Dates, plant employees who work in the actual manufacturing of the block; and yard employees William Leisenring, Ernest Tillman, Ross Wilck and Fred Little. Excluded from the unit were Eric Van Doyen (who was employed by another Haers' owned company), James Tillman (who had quit the Company), and the three men (Hundly, Burmaster and Hence) identified as supervisor, salesman, and retired. When the meeting was over, there was no question as to who was going to be in the unit or out of the unit; the unit was going to consist of *mechanics, yard people, plant workers and drivers*.

It is clear that, of the employees identified as comprising the unit, the Union had a majority signed to authorization cards. The Union "clearly defined the unit it sought to represent" — mechanics, yard people, plant workers and drivers — "and made a bargaining demand on the basis of authorization cards from a majority of employees in those categories."[58] The failure to identify by name an individual employee in that unit cannot serve to avoid the Company's bargaining obligation.[59]

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[57] *Ref-Chem Co.*, 169 NLRB 376, 380 (1968).

[58] *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d at 752.

[59] In *Lyon & Ryan Ford*, the Seventh Circuit held that:

> The fact that the parties failed to agree on the inclusion within the unit of two employees does not necessarily prove that the parties failed to agree substantially on the definition or scope of the unit.

Id.

Since the Board's determination that the Company recognized the Union in an appropriate agreed upon unit fully accords with established Board policy, that determination may not be disturbed.

CONCLUSION

For all of the foregoing reasons and authorities, the court below correctly concluded that the Board's order was supported by substantial evidence and, accordingly, enforced that order. The petition for writ of certiorari, therefore, should be denied.

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STATUTORY PROVISIONS INVOLVED

Section 1 of the National Labor Relations Act, as amended, 29 U.S.C. §151, provides that:

> Findings and Declaration of Policy
>
> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157, provides that:

> Right of Employees As To Organization
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> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1) and (5), provide that:

Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;

* * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

Sections 9(a) and (b) of the National Labor Relations Act, 29 U.S.C. §§159(a) and (b), provide that:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional em-

ployee and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

Sections 9(a) and (b) of the National Labor Relations Act, as amended, 29 U.S.C. §§159(a) and (b), provide that:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employee and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Sections 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §§160(e) and (f), provide that:

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement

of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board
on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.